BEFORE THE EDMONDS CITY COUNCIL

Re: Tom and Lin Hillman

APPEAL FROM FINAL DECISION UPON RECONSIDERATION, ENTERED BY EDMONDS HEARING EXAMINER PHIL A. OLBRECHTS APRIL 24th, 2013

REPLY BRIEF

PLN20120033

Stephen C. Schroeder and Cheryl L. Beighle, 1142 Vista Pl., Edmonds, WA 98020, Telephone # (425) 712-8694; and Todd and Candy Brown, 1135 Sierra Pl., Edmonds, WA 98020, Telephone # (425) 672-4418; Parties of Record, Appellants.

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We concur with the conclusion of the Lighthouse Law Group PLLC that the Hillmans (Applicants) have failed to meet their burden of proof that the proposed incursion into the wetland itself represents "the minimum necessary [impact] to allow for reasonable economic use of the property" [Lighthouse Law Group Memo to City Council, at p. 8]. As quoted by the Lighthouse Law Group Memo, the Hearing Examiner made clear factual findings on this issue:

"6. Minimum Variance. The most challenging issue for this proposal is whether the request constitutes the minimum necessary to grant relief from the City's critical area regulations. It appears that encroachments into the wetland could be almost entirely avoided by limiting the building footprint to 1,600 square feet, inclusive of garage space. The need to encroach into 1,790 square feet of Class III wetland is based upon the applicants' desire to have vaulted ceilings and a driveway that could be larger than necessary to serve the property. . .

*These are not sufficient reasons to justify an encroachment into wetlands" [*Record at 0013-0014].

Despite these clear findings, the Hearing Examiner essentially remanded the matter to city staff with instructions that included the taking of additional evidence from Wetland Resources, Inc. Indeed, he seems to delegate the final decision as to whether to allow the incursion into the wetlands to Wetland Resources, Inc. *"As discussed in FOF No. 6, staff shall consult with a qualified wetland biologist, who can be Andrea Bachman, to determine whether removing the proposed wetland encroachment would appreciably improve upon impacts to wetland functions."* [0020].

This is improper on several grounds. First, the Hearing Examiner has made a clear finding that the applicants have not met their burden to prove that the wetlands incursion is "necessary" [Lighthouse Memo at 8 and 9]. This should be the end of the matter, and the wetlands incursion portion of the variance request should simply be denied. Second, in remanding (in essence) the matter to staff, the Hearing Examiner improperly re-opened the proceedings instead of making a decision on the record as it existed at the conclusion of the hearing. By means of this remand, the Hearing Examiner would allow the applicants to adduce additional evidence in the form of expert opinion, but in a way that would deny the opposing parties to question or counter that evidence – or, indeed, to appeal it. Third, he did so in a manner that is fundamentally unfair. Wetland Resources, Inc., while a fully qualified wetlands expert, was acting in this matter as an advocate on behalf of its clients, the applicants. Contrary to the suggestion in the Hillmans' Response at page 10, this factual observation is not a disparagement of Ms. Bachman or her qualifications.[1] Unlike the situation in 2003 when her firm was hired by the City to delineate the sensitive area in question, however, Wetland Resources, Inc. was hired by the Hillmans in 2012 to advance their applications for variances. Their job was to muster all of the principled arguments in favor of their clients' application – not to be an objective and disinterested expert.

[1] By way of illustration, it is highly unlikely that the Hillmans (or any other opposing party, for that matter) would be comfortable with allowing a reputable wetlands expert hired by the appellants to oppose the variances sought in this matter, to make such an important decision unilaterally.

This quite normal bias makes the unilateral nature of the delegation of decision-making even more problematical.

On the basis of the record as it exists, we are asking the City Council to reverse the granting of the variance to the extent that it allows incursions into the wetland itself.

The Hearing Examiner's Condition No. 1 in his original Findings of Fact, Conclusions of Law and Final Decision issued on April 1, was stated in the alternative, i.e., whether reducing potential incursion into the wetland by moving some of the square feet of the house to the second floor, thus reducing its footprint; and moving it north further into the buffer, would reduce the ensuing damage to the wetland:

> 1. As discussed in FOF No. 6, staff shall consult with a qualified wetland biologist, who can be Andrea Bachman, to determine whether encroaching into the Category III wetland of the subject property causes significantly more damage to wetland functions than building within its buffer. If that is the case, staff shall displace as much of the wetland encroachment into the second story of the proposed home **and further northward into the buffer** as much as reasonably possible to reduce the encroachment into the wetland [Record at 0077 (emphasis added)].

In an email dated April 4, 2013, Andrea Bachman of Wetlands Resources, Inc., addressed the question of moving the footprint further north into the buffer, but did not address the alternative question of reducing the footprint to 1600 square feet [Record at 0054-0055]. Although even this limited and somewhat unresponsive opinion cannot properly be considered under the "no new evidence" rule, we feel that this clarifying comment is necessary to avoid misunderstanding on the issue.[2]

The Lighthouse Law Group's Memo of June 7, 2013, correctly identifies the following ordinance as the source of the Planning Division staff's recommendation and of what we believe to be the wrong result in this matter:

> ECDC 23.40.320 Definitions pertaining to critical areas.
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> "Reasonable economic use(s) means **the minimum use to which a property owner is entitled under applicable state and federal constitutional provisions** in order to avoid a taking and/or violation of substantive due process. "Reasonable economic use" shall be liberally construed to protect the constitutional property rights of the applicant. For example, the minimum reasonable use of a residential lot which meets or exceeds minimum bulk requirements is use for one single-family residential structure. Determination of "reasonable economic use" shall not include consideration of factors personal to the owner such as a desire to make a more profitable use of the site."

[2] This correspondence was not available on the Planning Division's web posting until the Record on appeal was published.

Added by Ordinance 3527 on November 23, 2004, (along with the rest of the code sections dealing with sensitive areas), this section, by its own terms, was intended to implement state and federal constitutional law, and apparently was intended to give simplifying guidance to City staff on this rather abstruse and complex area of the law. It was not, we believe, the intent of the City Council to redefine constitutional law, nor was it the intent to unduly restrict the City from lawfully exercising its police powers to promote the general welfare of the community by, among other things, protecting wetlands and other sensitive areas. Instead, this ordinance must be construed in the context of other Code provisions pertaining to sensitive areas, as well as case law interpreting and applying constitutional principles applicable to land use regulation.

For example, in Section 23.40.020 (Relationship to other regulations), enacted as part of the same ordinance (3527) the City Council expressed its legislative intent as follows:

> *A. These critical areas regulations shall apply as an overlay and in addition to zoning, site development, building and other regulations adopted by the city of Edmonds.*
>
> *B. Any individual critical area adjoined or overlain by another type of critical area shall have the buffer and meet the requirements that provide the most protection to the critical areas involved. When any provision of this title or any existing land use regulation conflicts with this title,* ***that which provides more protection to the critical area shall apply*** (emphasis added.)

In 23.40.160 (Review criteria), the City Council reiterated its intent that the sensitive area code provisions be construed and applied in their entirety, thus:

> A. Any alteration to a critical area, unless otherwise provided for in this title, shall be reviewed and approved, approved with conditions, or denied based on the proposal's ability to comply with all of the following criteria:
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> 1. The proposal minimizes the impact on critical areas in accordance with ECDC 23.40.120, Mitigation sequencing;
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> 2. The proposal does not pose an unreasonable threat to the public health, safety, or welfare on or off the development proposal site;
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> **3. The proposal is consistent with the general purposes of this title and the public interest;**
>
> 4. Any alterations permitted to the critical area are mitigated in accordance with ECDC 23.40.110, Mitigation requirements;
>
> 5. The proposal protects the critical area functions and values consistent with the best available science and results in no net loss of critical area functions and values; and

6. The proposal is consistent with other applicable regulations and standards (emphasis added).

In Section 23.40.210 Variances, the City Council repeated its intention that sections of the code be read and applied as an entity:

> A. Variances from the standards of this title may be authorized through the process of hearing examiner review in accordance with the procedures set forth in Chapter 20.85 ECDC only if an applicant demonstrates that one or more of the following two conditions exist:
>
> 2. The application of this title would deny all reasonable economic use (see the definition of "reasonable economic use(s)" in ECDC 23.40.320) of the subject property. A reasonable use exception may be authorized as a variance only if an applicant demonstrates that:
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> * * *
>
> c. The proposed impact to the critical area is the minimum necessary to allow for reasonable economic use of the property;
>
> * * * and;
>
> g. **The proposal is consistent with other applicable regulations and standards** (emphasis added).

Instead of construing the sensitive area ordinance as a whole, the Lighthouse Law Group memo singles out the definition of reasonable economic use set forth in ECDC 23.40.320 quoted above, and opines that it caused staff to conclude that "a property owner should be able to construct a single-family residence on a conforming single-family lot (a lot that meets minimum dimensional standards) in order to make reasonable economic use of that single-family lot" [Memo at p. 4]. In other words, the City Attorney seems to be saying that the Ordinance defining the minimum reasonable use of a lot as one single-family residential structure trumps the other statutes and the case law. Indeed, at page 12 of their memo, the Lighthouse Law Group characterizes the case law on the issue of regulatory takings as having "marginal relevance" in light of the definition of reasonable economic use,(although they concede that those cases provide a fuller understanding of the broader legal context of the issues). We respectfully disagree with this portion of that opinion.

In their Response To Appeal Memo, the Hillmans helpfully illustrate the potential consequences of such an interpretation: *"The minimum requirements for an RS-12 lot include a 12,000 sf lot area and 90' of lot width (ECDC 16.20.030 Table of site development standards), which our lot far exceeds. Normally, these requirements would allow our lot to be subdivided into three*

12,000+ sf parcels, with a 4200+ sf footprint house on each one (based on the 35% allowable coverage in the table) [at page 4-5]."

This assertion, a *reductio ad absurdum*, starkly reveals the extreme consequences of isolating the section of the ordinance defining reasonable economic use, and treating it as if it trumps the balance of the code as well as state and federal Supreme Court decisions on land use regulation. Under a literal application of that isolated section, the Hillman Family Trust (the owner of the property in question) could put the streams in culverts, fill in the entire wetland, totally eliminate the buffers, and utterly destroy the habitat in order to construct three houses on the land. If this were, indeed, the intent of the City Council when it enacted the sensitive area protection ordinances, then it is not at all apparent why those statutes were enacted at all. We strongly believe that this is not what the City Council intended, and that the reasonable economic use section has been taken out of context and, therefore, misinterpreted. It was not, we believe, intended to effectively repeal the balance of the relevant ordinances.

In fact, a number of ordinances deal with the issue: One identifies and protects sensitive areas, streams and wetlands [ECDC 23.40.040 and 23.50]; another creates buffers to further protect those areas [ECDC 23.50.030.F]; another contains its own variance standards for sensitive areas, including a provision to reduce buffer by up to fifty percent with mitigation [ECDC 23.40.120].

This entire body of statutory law must be construed in its entirety, in light of the state and federal case law pertaining to land regulation. Little purpose would be served by reiterating the case law and expert commentary set forth in our Argument Brief filed on May 31, 2013, and as commented upon in the Lighthouse Law Group Memo prepared for this body on June 7, 2013. It bears emphasizing, however, that the decisions of the United States Supreme Court have consistently held that no regulatory taking occurs when an owner lacks reasonable investment-backed expectations because background principles of the State's law of property have placed restrictions upon ownership. This language has consistently been upheld, and has routinely been construed to include reasonable land-use regulations, especially if those regulations are in place when the owner acquires the land.

In the Applicants Response, they assert that they had a reasonable expectation that they would be allowed to build on their land because of two similar variances that had been previously granted in the same area. The first example, the Hachler residence at 1111 Sierra Place, is simply not a precedent. The variance was granted in 1999, five years before the City's current sensitive area ordinance was enacted, and two years before the City "determined that the property potentially contained a number of critical areas" [Record at 0084]. As to the Lewis variance previously partially granted in 2005, we would point out that, except for the rear boundary setback request, it was unopposed, and suggest that it was improvidently approved. In any event, the proposed residence was never built and both the variance and the ensuing building permits (which have a life of one year unless extended) were abandoned and expired as a matter of law.

The reasonableness of the applicants' expectations is reviewable by this body as a mixed question of fact and law. A number of factors combine to establish that any expectation to build on this piece of property was speculative. The Hillmans paid a modest sum – an amount substantially below the value of adjacent properties that were not similarly restricted -- for the chance to build a house on a piece of property that they knew was severely restricted by wetlands regulations. Given the need for substantial variances before a single family residence could be built, their prospects for success were highly problematic from the onset of their ownership. Moreover, this parcel alone among the adjacent properties has gone undeveloped for more than a hundred years. The Applicants' protestations notwithstanding, this was a clear signal that building on this land would be problematical. They simply chose to disregard these conditions and seek a windfall bargain. Such is not the kind of economic expectation that land use law is designed to protect.

WHEREFORE, we urge the City Council to Reverse the hearing examiner's decision in this matter due to a failure of proof that the proposed footprint is the minimum necessary to allow for reasonable economic use. In addition, the decision should be reversed due to a misinterpretation of the law. By taking the definition of "reasonable economic use" contained in ECDC 23.40.320 out of context and emphasizing it at the expense of the other provisions in the code, the hearing examiner committed reversible error. This body is urged to clarify that the legislative intent behind the enactment of Chapter 23 of the ECDC was to protect environmentally critical areas, and that all of the provisions of that Code should be interpreted and applied together in a manner that promotes that intent – even if that application results in a determination, on rare occasions, that a particular site is not suitable for building a single family residence.

We have read this Reply Brief and believe the contents to be true.

Dated this 12th day of June, 2013,

Stephen C. Schroeder

Cheryl L. Beighle

Todd Brown

Candy Brown